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U.S. Department of Transportation
Dockets Management Facility
Room PL-401
400 Seventh Street SW
Washington, D.C. 20590

ATTN: Docket Number FHWA 2005 – 22986, FHWA RIN 2125-AF09;
FTA RIN 2132-AA82

RE: Statewide and Metropolitan Transportation Planning Proposed Rules

Thank you for the opportunity to comment on the joint FHWA-FTA proposed updates and amendments for 23CFR450 to implement the new SAFETEA LU statewide and metropolitan planning requirements. The Washington State Department of Transportation supports the FHWA-FTA efforts and appreciates the continued coordination and support from the division and region offices in Washington State.

The Washington State Department of Transportation (WSDOT) acknowledges the need for this rulemaking. With both TEA-21 and SAFETEA-LU modifying the planning requirements, we welcome the opportunity to incorporate statutory changes into a set of focused and flexible planning regulations.

WSDOT supports the overall flexibility in the proposed rules. Flexibility allows federal division and region staff and States and Metropolitan Planning Organizations (MPOs) to implement transportation planning processes and develop plans that incorporate local and regional needs and values. We appreciate the effort of the proposed rules to adhere closely to the underlying statutory provisions. In the proposed rules, a good example of these principles of flexibility and adherence to statute is the option for States to include a financial plan in the statewide transportation improvement program (Sec.450.216(l)).

We have, however, several concerns and specific suggestions regarding these proposals that are outlined in the following comments with specific details contained in the attachment.

In general, WSDOT welcomes the support that FHWA and FTA can provide to States and MPOs in transportation planning. The best support is the continuing recognition of the basic purpose for which we plan: to provide a considered, rational basis for our elected decision makers to set needed policy direction for and make investments in the public's transportation system. Any proposal that undermines the ability and efficiency

of States and MPOs to achieve that purpose and that adds unnecessary steps in the planning process should be removed as barriers to effective transportation planning.

In many areas, the proposed regulations closely reflect the statutory language. However, proposed regulatory provisions that deviate from the statute or go beyond statutory requirements, should be modified to conform to the statute. In particular, regulations should not be used to impose new mandates that go beyond Congress' intent as embodied in the requirements of the statute. Where the proposed regulations unnecessarily limit flexibility, they should be removed or changed to provide that flexibility. For example, the proposed regulations would delete an existing provision that allows States to consider the "scale and complexity" of the issues in determining the "degree of consideration and analysis" of the planning factors. In addition, there are a number of areas where "coordination" requirements are to be imposed where a lesser requirement is established by statute. We require specific changes to preserve the flexibility allowed under the statute.

The proposed regulations incorporate two existing guidance documents as appendices—one on linking planning and NEPA processes and the other on fiscal constraint. WSDOT strongly objects to incorporating these guidance documents into the regulations. Converting guidance to the status of regulation will open up FHWA and FTA and the States and MPOs to litigation premised upon selective reading of short passages from these lengthy documents. As practices evolve, future changes in guidance will become difficult, limiting the effectiveness of the guidance. WSDOT strongly urges FHWA and FTA to keep the guidance as guidance.

In the area of fiscal constraint, WSDOT observes and is troubled by the experience of other states. There appears to be a trend of escalating bureaucratic, prescriptive, and inflexible approaches to fiscal constraint. The proposed regulations reinforce this trend reducing an effective planning tool to a duplicative, counterproductive budgeting and cash management exercise. This is certainly not Congress' intent. WSDOT is especially concerned about requiring fiscal constraint analyses to account for *all* costs and revenues for operating the "entire transportation system." This interpretation has no basis in statute and would result in unjustified federal intrusion into State and local decision-making.

As for linking planning and NEPA, WSDOT supports the overall approach and flexibility outlined in the proposed regulation. We do have a number of significant concerns about the way this approach is proposed to be implemented through the regulations. As proposed the regulations may actually discourage opportunities for planning studies to provide useful information for project development NEPA processes. A key concern is the requirement that planning studies "meet the requirements of NEPA" in order to be incorporated into the NEPA process. This requirement could be taken to mean that the only way to link planning and NEPA is to perform a NEPA analysis in the planning process. Congress did not intend such a requirement and we believe it is vital to clarify the final rules to ensure that good, sound planning can produce results that are acceptable for use in the NEPA process.

The statutory deadline for compliance with SAFETEA-LU planning requirements, July 1, 2007, is rapidly approaching. Achieving compliance with all the new requirements by that date will be a substantial challenge. The proposed regulations adopt an overly rigid interpretation of this deadline, which could severely disrupt State and MPO planning and programming in 2007 and beyond. We suggest several specific changes that conform to the statute while allowing an appropriate degree of flexibility in meeting this deadline.

WSDOT appreciates this opportunity to comment on the proposed rules implementing the planning requirements under SAFETEA-LU. If you need clarification of these comments please contact Brian Smith, Strategic Planning and Programming Director, at (360) 705-7958 if you have any questions.

Sincerely,

Paula J. Hammond, P.E.
Chief of Staff

Attachment: Changes Requested by the Washington State Department of Transportation

Attachment:
Changes Requested by the Washington State Department of Transportation

Linking Planning and NEPA

WSDOT supports replacing the Major Investment Study (MIS) requirement with an optional process that allows States and MPOs to conduct planning-level studies that can be relied upon in determining the scope of later NEPA studies. With recent passage of two significant transportation investment programs, Washington State is faced with delivering large programs of projects. We need to deliver those projects on time and within budget. In Washington State, we have been working with our MPOs to make our planning studies useful to subsequent NEPA analysis of specific projects. We must prevent recycling NEPA issues in project development that have been most appropriately dealt with in planning (such as purpose and need for system improvements; general improvement or corridor locations; consistency with transportation, land use and economic development plans; and natural resource protection and management plans). We think that reducing the turbulence that occurs as issues are recycled is the true spirit of streamlining project delivery. The February 2005 guidance on this topic identifies recommended practices for corridor or subarea planning studies. This guidance is flexible and sufficient to bolster current efforts and ensure that more planning-level information is carried forward into project development NEPA analysis. WSDOT certainly agrees with the statement that Congress did "not extend NEPA requirement to transportation plans and programs."

WSDOT also agrees with the optional approach, at the discretion of the State or MPO, to use this tool. We also applaud USDOT for recognizing that corridor or subarea planning studies are an appropriate level of planning to implement linking planning and NEPA. This is a more suitable place for discussing the transportation needs of a corridor or area in more detail than a statewide transportation policy plan. However, WSDOT has several specific concerns about how this change would be implemented under the proposed regulations.

Remove Appendix A and Section 450.212(c) and revise Sections 450.212(a) and 450.318(a) of the proposed rule to read:

> *"Sec. 450.212(a) State(s) may, in cooperation with MPO(s) and/or public transportation operator(s), undertake a corridor or subarea planning study as part of the statewide transportation planning process. A corridor or sub-are planning study developed by an MPO or public transportation operator may be incorporated into the statewide transportation planning process at the State's discretion. A particular planning study need not be named in or specifically identified in the statewide transportation plan in order to be carried forward into later*

NEPA analysis. This section does not extend NEPA requirements to transportation plans and programs. Implementation of this section is voluntary. Specifically, these corridor or subarea studies may be used to produce any of the following for a proposed transportation project:", at which point the enumerated list of products continues.

We request these revisions and clarifications for the following reasons.

In TEA-21, Congress directed the Secretary to eliminate the separate Major Investment Study requirements contained in 23 CFR 450.318 and to integrate them into the analysis required in the planning provisions of 23 USC chapter 53 or title 49, and the National Environmental Policy Act of 1969 (42 USC 4231 et seq.) We believe that 23 USC 450.212 and 450.318 adequately carry out this direction (if amended as described in following comments). The original MIS requirements consisted of only eleven short paragraphs and lacked reference to the procedural requirements of the regulations implementing NEPA. By contrast, the February 2005 FHWA guidance document "Linking the Transportation Planning and NEPA Processes," which forms the basis of Appendix A, is eighteen pages long. Incorporating guidance information as Appendix A of the rules is unnecessary for meeting Congress' intent to carry forward information from planning into later NEPA processes. The appendix may create opportunities for creative and unwarranted judicial interpretation. The February 2005 FHWA guidance document is useful for presenting up-to-date examples of best practices. The guidance presents current interpretation of regulatory and statutory requirements. Keeping the guidance as guidance allows for adaptability as changes occur that may affect the interpretation, such as changes in other statutes and regulations, Executive Orders, judicial action and even smaller-scale particulars like changing web-addresses. Keeping this valuable guidance updated if Appendix A is incorporated as a formal part of the regulations will require a future lengthy rule-making process defeating the purpose and utility of such a guidance document. This concern seems to be borne out by the removal of specific examples from the guidance in its conversion to Appendix A. The February 2005 guidance is sufficient to allow States and MPOs the flexibility to implement linking planning and NEPA as appropriate. WSDOT disagrees with the notion that Appendix A is necessary for such implementation. Congress' intent can be met with Sections 450.212 and 450.318 both of which can bolster the FHWA/FTA role in supporting the results of State and MPO planning. Allowing the current guidance to remain guidance and not regulation will also allow future modifications to be discussed and disseminated far more easily than through another rule-making process. Therefore, Appendix A should be removed.

We also note that the stated intent of Appendix A is "culture change" and we find no statutory authority for USDOT to propose or promulgate culture change. In particular we note that the NPRM is silent on the roles of other key participants in the "culture" of transportation planning processes as carried out by States and MPOs, including the regulatory or resource agencies.

WSDOT believes that regulations themselves should establish the basic framework for conducting optional planning-level studies that can be relied upon as the basis for defining the scope of NEPA reviews. Any necessary guidance should be issued as guidance—not as part of the regulations.

In both Sec. 450.212(a) and Sec. 450.318(a), the regulations should more clearly delineate the responsibility for carrying out these studies within the statewide and metropolitan planning processes.

Avoid "NEPA-izing" the transportation planning process—remove the second sentence of Sec 450.212(a) and in Sec. 450.318(a).
The proposed regulations state in paragraph (a) of 450.212 and 450.318 that the results of corridor or subarea studies may be incorporated in the NEPA process "to the extent that they meet the requirements of [NEPA] … and associated implementing regulations...."

WSDOT objects to this language because it implies that full NEPA-level detail must be achieved in planning in order to carry planning-level decisions into NEPA which is clearly not Congress' stated intent. Rather, WSDOT supports the language used in paragraph (b), which lists a series of factors to consider in determining the extent to which planning-level studies can be used in the NEPA process. The language of paragraph (b) is appropriate because it provides broad flexibility for determining the extent to which a NEPA study can rely on planning-level studies.

The original MIS requirements, contained in 23USC 450.318 were only intended to bring the alternatives and other analysis requirements found in transit project proposals earlier into the highways planning process where major projects were proposed, and to allow the initiation of NEPA if desired and appropriate. Those MIS requirements did not require that MIS analyses be conducted to the standard specified by the reference to the NEPA statute and regulations that had been included in the NPRM. Rather, the MIS was intended to develop information useful as input to subsequent environmental documents and project decisions, unless the participating agencies decided to exercise the option of actually preparing the environmental document (EA or EIS) as a product of the MIS. The MIS requirement encouraged considering a range of issues including mobility improvements; social, economic, and environmental effects; safety; operating efficiencies; land use and economic development; financing and energy consumption. These are all issues which are better addressed in statewide, regional, system or corridor planning where a broader perspective informs the definition of project purpose and need, general location and general community and environmental compatibility. We believe that Appendix A of the proposed NPRM (and FHWA's original 2005 guidance document on this subject) has the proper perspective in Section 1 Procedural (2) where it states that "to the extent the information incorporated from the transportation planning process, standing alone, does not contain all of the information or analysis required by NEPA, then it will need to be supplemented by other information contained in the EIS or EA that would, in conjunction with the information from the plan, collectively meet the requirements of NEPA. The intent is not to require NEPA studies in the transportation planning process." We believe this captures the spirit of the MIS requirements and

congress's intent to mainstream those requirements. The focus should be on the documented quality of the information developed during planning that can be carried forward in project level NEPA, and not on compliance with NEPA procedural regulations. In fact as currently worded, the NPRM sections would seem to violate the stated intent of not placing NEPA requirements on planning studies.

WSDOT suggests a corresponding set of revisions be made to the proposed rules at Sec. 450.318 for MPO-lead corridor or subarea planning studies to read:

> *"MPO(s) may, in cooperation with State(s) and/or public transportation operator(s), undertake a corridor or subarea planning study as part of the statewide transportation planning process. A corridor or subarea planning study developed by a State or public transportation operator may be incorporated into the metropolitan transportation planning process at the MPO's discretion. A particular planning study need not be named in or specifically identified in the metropolitan transportation plan in order to be carried forward into later NEPA analysis. This section does not extend NEPA requirements to transportation plans and programs. Implementation of this section is voluntary. Specifically, these corridor or subarea studies may be used to produce any of the following for a proposed transportation project:"* at which point the enumerated list of products continues.

The following additional changes should also be made in these sections of the proposed regulations that address the linkage between the transportation planning and NEPA processes (450.212 and 450.318).

Sec. 450.212(a)(2) and Sec. 450.318(a)(2), should both read:

> *"(2) General travel corridor and/or general mode(s) definition (<u>e.g.</u>, highway, transit, or a highway/transit combination);"*

This would recognize that "General Mode" applies to more than the modes specified by changing "i.e." to "e.g." Paragraph (a)(2) in both Section 450.212 and 450.318 allows the planning studies to be used to identify the "general mode," but the "i.e." used in the NPRM appears to limit the modes to be defined as solely "highway, transit, or a highway/transit combination." The planning process also often includes consideration of other modes, for example ("e.g.,")., rail, air, and ports. WSDOT recommends modifying the wording of the proposed regulation to recognize that multiple modes may be considered and defined in the planning process.

Sec. 450.212(b)(2) (iii) should read:

> *"(iii) <u>Reasonable</u> opportunity to comment during the <u>statewide</u> transportation planning process and development of the corridor or subarea planning study;"*

and Sec. 450.318(b)(2)(iii) should read:

"(iii) Reasonable opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;"

The NPRM's wording implies that the comment opportunity must be ongoing throughout the planning process. State DOTs and MPOs must have the opportunity to set reasonable time frames for comment. To allow that flexibility, the regulation should refer to a "reasonable opportunity" to comment. This would be consistent with the wording used in the existing MIS regulation.

In Sec. 450.212 (b)(2)(iii) there appears to have been a drafting error on the word "metropolitan" which should, from the context, be "statewide." WSDOT recommends that this provision be changed to refer to the statewide transportation planning process.

Delete paragraph (c) of Sections 450.212 and 450.318 for two reasons.
The first sentence in paragraph (c) in both Sections 450.212 and 450.318 is redundant, because it essentially says that the NEPA lead agencies can incorporate planning-level decisions directly or by reference into NEPA documents; this same point is made in similar words in paragraph (b). Paragraph (b) then could be revised to clarify that planning documents can be incorporated "directly or by reference" into NEPA documents; the first sentence in paragraph (c) should be deleted. Secondly, the final sentence of paragraph (c) in both Section 450.212 and 450.318 cross-references Appendix A (the planning-NEPA linkage guidance). For the reasons noted earlier, Appendix A should remain as guidance. Therefore, this cross-reference should be deleted. If this recommendation and the previous recommendations are made, paragraph (c) would be deleted altogether.

Fiscal Constraint of Transportation Plans and Programs

WSDOT supports the basic goals of the fiscal constraint requirement. This requirement is intended to ensure that metropolitan plans, TIPs, and STIPs all reflect reasonable assumptions about the availability of future revenues, rather than becoming "wish lists" that have no relation to fiscal reality. Incorporating reasonable financial assumptions into the development of a plan, TIP, or STIP is simply good planning and WSDOT supports this basic concept.

WSDOT is deeply concerned that the fiscal constraint requirements may be interpreted in a manner that is unjustified by the underlying statutes. This can result in a wasteful bureaucratic exercise that ultimately will detract from the goal of achieving fiscally constrained metropolitan plans, TIPs, and STIPs. Therefore:

WSDOT believes the regulations should establish the basic framework for making fiscal constraint findings. Any useful and collaboratively developed guidance should be issued

as guidance—not as part of the regulations. Thus WSDOT requests removal of Appendix B from the regulation.

Further concerns about fiscal constraint follow:

Statutory Requirement Focuses on Funding for Projects in Metropolitan Plan, TIP, and STIP, but not the "entire transportation system."

The underlying statutory basis for the fiscal constraint requirement differs somewhat for statewide and metropolitan planning, but in both cases the requirement focuses on the availability of funding for projects included in the metropolitan plan, the TIP, or the STIP. These projects can be—and typically are—funded with a combination of federal, State, and local revenues (and sometimes private investment as well.) There is a legitimate federal interest in State, local, and private revenues to the extent that those revenues are being relied upon to fund projects included in a metropolitan plan, TIP, or STIP. However, there is no overarching role for USDOT as the federal overseer of all State, local, and private spending related to transportation. Yet that is exactly the role contemplated by FHWA and FTA in the proposed regulations.

The assertion of federal oversight responsibility over *all revenues and expenses for the entire transportation system* is an extreme and unjustified federal intrusion into State and local affairs. This overreaching is especially curious in the current funding environment, where the federal contribution is *shrinking* relative to State, local, and private contributions. The regulations must be modified to re-focus the fiscal constraint requirement on the specific issue addressed in the statute, which is the *ability of States and MPOs to fund the federally assisted projects that are included in a metropolitan plan, TIP, or STIP.*

These statutory requirements are narrowly focused on ensuring the reasonable availability of funding for projects that a State or MPO chooses to include in a plan, TIP, or STIP. The regulation should conform to the statute.

Fiscal Constraint Provides No Basis for FHWA and FTA to Dictate State and Local Funding Priorities

The fiscal constraint requirement, in statute, is neutral as to the content of State and MPO transportation decisions. The statute simply requires the State and MPO to ensure that funds "are reasonably expected to be available to support program implementation" and "carry out the Plan" [23USC134(i)(2)(C); 23USC(j)(1)(C); and 23USC135(g)(4)(F)]. If this requirement is met, the plan, TIP, or STIP meets the fiscal constraint requirement. There is no statutory requirement to achieve an "adequate" level of operations and maintenance. Nor is there any statutory requirement to provide an "adequate" level of new capacity, or an "adequate" reduction in congestion, or an "adequate" level of safety, or an "adequate" level of any other measure of transportation performance.

Despite the clear intent of the statute, USDOT created a requirement for maintaining an "adequate" level of operations and maintenance when it issued the planning regulations in 1993. Appendix B in the NPRM seeks to soften this requirement by emphasizing that State and local governments are responsible for determining what level of operations and maintenance is "adequate." This statement is welcome, but it doesn't go far enough. The root of the problem remains: the regulations contain a substantive requirement for which there is no statutory basis. This requirement should be removed.

Fiscal Constraint Should be Used as a Planning Tool, Not an Accounting or Budgeting Tool

The fiscal constraint requirement was established to ensure that plans, TIPs, and STIPs are based on reasonable estimates of the revenues available to support the projects and services contained in those plans and programs. In this sense, fiscal constraint is fundamentally a planning tool grounded in fiscal reality. The fiscal constraint requirement was never intended to substitute for a State's budgeting process, nor was it intended to be a comprehensive financial management system for tracking revenues and expenditures. For fiscal constraint to serve its intended purpose, it must remain a flexible planning tool.

WSDOT is deeply concerned about reports from other states that fiscal constraint compliance has increasingly shifted toward an accounting-based approach, which involves more and more detailed information about State and local revenues and expenditures. In addition to being overly intrusive and unjustified by statute, this approach to fiscal constraint threatens to tie up the planning process in accounting red tape. Rather than promoting better financial stewardship, this approach will shift an ever-increasing share of MPO and State attention to balancing and re-balancing the books to reflect the constant fluctuations in revenues, costs, project priorities, and schedules. This diversion of limited staff resources will detract from good planning and confuse the public.

To provide the necessary degree of flexibility, changes to the regulations are needed in the following areas:

- **Fiscal Constraint for an Amendment Should Focus on the Incremental Changes Associated with the Amendment**
  Section 450.104 (in the definitions of "amendment" and "update") states that a fiscal constraint finding is required for any amendment or update to a metropolitan plan, TIP, or STIP. Appendix B further provides that FHWA and FTA will not approve an amendment or update if there has been a change in revenue conditions or costs for projects in the plan, TIP, or STIP. Appendix B, at page 33537, states that: "Importantly, the FHWA and FTA will not act on new or amended metropolitan transportation plan, TIP, or STIP unless they reflect the changed revenue situation… The same policy applies if project costs or

operations/maintenance cost estimates change after a metropolitan transportation plan, TIP, or STIP are adopted."

While the regulations themselves allow flexibility in terms of the fiscal constraint analysis needed for an amendment, Appendix B indicates that a fiscal constraint finding for an amendment could involve a wide-ranging review of revenue and costs assumptions underlying any and all projects in the entire metropolitan plan, TIP, or STIP. We strongly object to this approach. The regulations and guidance should preserve the necessary flexibility by expressly allowing a fiscal constraint finding for an amendment to be based on the incremental cost and incremental revenue changes associated with the amendment; comprehensive review of all costs and all revenues should be required only when a plan, TIP, or STIP is updated. Since updates are required at least every four years, and often occur more frequently, they provide a sufficient opportunity to review the revenue and cost assumptions underlying the entire plan, TIP, or STIP.

- **Fiscal Constraint Should Not Have to be Demonstrated "By Source"**
  Sections 450.216(m) and 450.324(i) of the proposed regulations require fiscal constraint to be demonstrated "by source" for STIPs and TIPs. Current regulations do not include this requirement. If adopted, this requirement would eliminate much-needed flexibility to accommodate changes in project costs, schedules, and revenue sources by shifting the "mix" of funding sources for various projects in the TIP or STIP. WSDOT strongly urges FHWA and FTA to eliminate this new restriction by deleting the words "by source" and thereby allow an overall finding that available funds are sufficient to pay for the projects included in the metropolitan plan, TIP, or STIP.

- **Financial Forecasts Should Not Have to be Made in "Year of Expenditure" Dollars**
  Appendix B of the proposed regulations states in several places that metropolitan plans, TIPs, and STIPs must reflect estimated "year of expenditure dollars." This requirement has no basis in the statute. It also was not included in the May 2005 interim guidance on fiscal constraint. The expression of project costs and forecasts of revenues in either "year of expenditure dollars" or "present day dollars" are both valid approaches and, as long as there is consistency between the expression of project costs and revenues, the choice should be left to the discretion of the parties. We note that even the USDOT's own "Conditions and Performance Report" does not use year of expenditure dollars for forecasting future project costs.

- **Examples of "Reasonable" and "Unreasonable" Revenue Forecasts are Simplistic and Should be Omitted**
  Appendix B provides examples of "unreasonable" revenue assumptions, as guidance for determining the reasonableness of State and MPO revenue forecasts. These examples are overly simplistic and insensitive to the diverse conditions that may exist in individual States. There may be cases in which it is, in fact,

reasonable to assume a sharp increase in revenues, as has occurred in Washington State after the passage of significant funding packages, or to assume that a previously rejected ballot measure will be approved. These are complex issues involving judgments about political and electoral outcomes—issues far outside the expertise of FHWA and FTA field office personnel. Rather than providing simplistic examples, the guidance should direct FHWA and FTA personnel to show deference to State and local officials' forecasts of State and local revenues, particularly where those forecasts are based on judgments about likely political and electoral outcomes at the State and local level.

- **Advance Construction Should be Addressed at a Program Level, not Tracked in the TIP or STIP on a Project Basis**
  Appendix B requires advance construction (AC) projects to be shown twice in the TIP or STIP: once at the time of initial authorization of the AC project and then again when the AC project is converted to federal funds. In practice, AC is used as a cash flow management device, which is best understood and tracked at the program level—in terms of the total amount of AC being used—rather than being tracked at the project level. In addition, any effort to show each individual project in the TIP and STIP when it is converted to federal funding adds no value and is confusing and misleading to the public. Rather than being converted all at once, a single project is often partially converted at multiple points. Requiring each of these partial conversions to be listed in the TIP/STIP would create a significant burden, with little value to the planning process or public understanding. We recommend revising the guidance to allow AC to be discussed in general terms in the TIP and STIP, rather than being individually tracked for each AC project.

- **Preserve Flexibility and Ensure that Fiscal Constraint is Implemented as a Broad Planning Tool**
  The interim guidance on fiscal constraint (issued in May 2005) included spreadsheets that called for a breakdown of revenues and expenses in funding sub-categories (within each of the core federal funding programs). These spreadsheets are rarely used in practice as they are not an effective tool for fiscal constraint. While the spreadsheets were not mandated in the guidance, and are not included in the NPRM, many States have experienced increasing demands for more detailed accounting of revenues and costs. WSDOT suggests that FHWA and FTA include language in the preamble and regulations that specifically preserves flexibility for States and MPOs to adopt a method for demonstrating fiscal constraint that is appropriate in scale and complexity to the circumstances of that State or metropolitan area.

An "Amendment" Should be Defined as a "Major" Change; and States and MPOs Should Develop the Criteria for Applying This Definition

The proposed regulations define an "amendment" to include (a) the addition or deletion of a regionally significant project or (b) a substantial change in the cost, design concept,

or design scope of an included project. In principle, these are valid criteria. However, WSDOT is concerned these criteria could be interpreted very broadly, thus requiring fiscal constraint findings for minor changes to a plan, TIP, or STIP.

We propose the following language:

> *"Amendment means a revision to a long-range statewide or metropolitan transportation plan, TIP, or STIP that includes (a) the addition or deletion of a regionally significant project, or (b) as agreed between the State and the MPO(s), a substantial change in the cost, design concept, or design scope of an included project."*

Further, when a metropolitan plan, TIP, or STIP is amended, there should be no requirement to conduct a comprehensive re-analysis of the cost and revenue assumptions underlying the entire document. A comprehensive review of fiscal constraint, i.e., all revenues and all costs should be required only when a metropolitan plan, TIP, or STIP is updated.

The May 2005 Guidance on Fiscal Constraint Should be Rescinded and Re-Issued with Appropriate Changes After Completion of this Rulemaking

Like the proposed regulations, the guidance assumes that FHWA and FTA are responsible for overseeing the financial affairs of all State and local governments with regard to the "entire transportation system." There is no statutory basis for such an assertion of federal authority. The presumed federal role, increasingly aggressive and intrusive as reflected in the guidance and demonstrated by other States' experiences, creates an unnecessarily adversarial relationship among Federal, State, and local transportation partners, and undermines rather than promotes the true purposes of the statutory fiscal constraint requirements.

WSDOT looks forward to collaborating with FHWA and FTA on future fiscal constraint guidance.

Potential Justifications for Retaining the Existing Regulatory Language are Not Persuasive

WSDOT is aware that, in the past, FHWA and FTA have advanced several potential justifications for the broad reading of the fiscal constraint requirement. In the next few points, WSDOT finds that none of those arguments are a legally sound justification for the proposed regulations.

- *"This requirement has been included in the regulations since 1993."* As FHWA and FTA have noted, the planning regulations have included the requirement since 1993 for a finding that the existing system is being adequately operated and maintained. But this requirement exceeded FHWA and FTA's statutory authority

from the moment it was included in the regulations. The fact that it was improperly included in 1993 does not provide any justification for retaining it now, when the regulations are being comprehensively revised. Moreover, for more than a decade after issuing the 1993 regulations, FHWA and FTA implicitly acknowledged that lack of statutory foundation by avoiding enforcement of this provision. So the *practice* since 1993 has been consistent with the statute. WSDOT urges FHWA and FTA to conform the regulations to the statute, which would also conform to the way this aspect of fiscal constraint has actually been implemented. Requiring system-wide findings of "adequate operations and maintenance" would actually be an abrupt and dramatic change from current practice, in addition to being unjustified by the statute.

- *"The regulations allow flexibility in meeting this requirement."* The regulations and preamble provide some flexibility in terms of the level of detail needed to demonstrate the costs and revenues for the entire transportation system. They also recognize that States and MPOs are responsible for determining what levels of operations and maintenance are considered "adequate." Of course, this flexibility is welcome. WSDOT observes that other States have experienced an "accounting mindset" that requires them to provide an ever-increasing level of detail. This trend could be greatly accelerated if courts become involved in reviewing fiscal constraint findings, as suggested by recent letter-writing campaigns by third-party groups who have questioned fiscal constraint findings. For these reasons, there can be no real assurance that these extra-statutory requirements will be interpreted in a flexible manner in the future. The only real solution is to conform the regulations to the underlying statutory framework.

- *"States already are required to demonstrate adequate maintenance under other laws."* An existing statute, 23 U.S.C 116, requires States to ensure adequate maintenance of highways built with federal-aid (Title 23) funds. This statute cannot be used to justify the overly broad reading of the fiscal constraint requirement. This statute applies only to highways, not transit systems. It applies only to federal-aid highways, not the entire highway system. It focuses on present conditions, not future conditions. If anything, this statute demonstrates that there are existing safeguards already in place to ensure that the federal investment in the federal-aid highway system is maintained. The existence of this separate requirement does not give FHWA (much less FTA) a basis for requiring States and MPOs to demonstrate that sufficient funding exists to preserve the "entire transportation system" for 20 years into the future.

- *"FHWA has a responsibility to ensure good financial stewardship."* Section 1904 of SAFETEA-LU (codified at 23 U.S.C 106(g)) heightened FHWA's obligations regarding financial stewardship and oversight. But this section also focuses on *federal oversight over the expenditure of federal funds.* This section does not give FHWA a mandate to probe the inner workings of every State's transportation agencies, much less those of local governments. The federal role must be

connected to the use of federal funds. Nothing in Section 1904 changed that fundamental, defining aspect of the Federal-State relationship in transportation.

In sum, the assertion of federal oversight responsibility over *all revenues and expenses for the entire transportation system* is an unjustified intrusion of federal agencies into State and local affairs. The regulations must be modified to re-focus the fiscal constraint requirement on the specific issue addressed in the statute, which is the ability of States and MPOs to fund the federally assisted projects that are included in a metropolitan plan, TIP, or STIP.

Phase-in of New Requirements

WSDOT believes the phase-in requirements in Section 450.224 and 450.338 are overly restrictive and are not justified by the statute. There are several problems with these provisions:

Revise Sec. 450.224(c) to remove the proposed deadline requirement for Plan and TIP/STIP amendments; this paragraph should read:

"(c) In addition, the applicable action (see paragraph (b) of this section) on any updates to STIPs or long-range statewide transportation plans on or after July 1, 2007, shall be based on the provisions and requirement of this part."

The statute requires compliance only for updates, not amendments. The language in Section 6001(b) of the statute is unambiguous: "Beginning July 1, 2007, State or metropolitan planning organization plan or program updates shall reflect changes made by this section." Requiring compliance for amendments contravenes the clear and explicit direction of Congress in the statute. This would also contradict Section 6001(b) of the statute, which provides that "[t]he Secretary shall not require a State or metropolitan planning organization to deviate from its established planning update cycle to implement changes made by this section."

Similarly revise Sec. 450.338(c) to read:

"(c) In addition, the applicable action (see paragraph (b) of this section) on any updates to TIPs or metropolitan transportation plans on or after July 1, 2007, shall be based on the provisions and requirement of this part."

Revise Sec. 450.338(b) so that the "effective date" applies only to the date of an adoption action by the MPO, which should now read:

"(b) For metropolitan transportation plans and TIPs that are developed under TEA-21 requirements prior to July 1, 2007, the MPO approval

action must be completed no later than June 30, 2007. For metropolitan transportation plans in attainment areas that are developed under TEA-21 requirements prior to July 1, 2007, the MPO adoption action must be completed no later than June 30, 2007. If these actions are completed on or after July 1, 2007, the provisions and requirements of this part shall take effect, regardless of when the metropolitan transportation plan or TIP were developed."

The action required to be completed by July 1, 2007, should be an MPO adoption action, not the conformity approval by FHWA or FTA. The proposed regulation states that the relevant approval action for purposes of the July 1, 2007, deadline is FHWA's and FTA's conformity finding for the plan or TIP—not the MPO adoption of the plan or TIP, which occurs earlier. This interpretation shortens by several months the deadline for MPOs to take their action approving a plan or TIP in nonattainment and maintenance areas. The statute does not require such a restrictive interpretation; it refers to "updates" that must be completed by July 1, 2007, and an "update" is the action taken by the MPO, not the conformity finding taken by FHWA and FTA.

Section by Section (not otherwise covered above)

450.104 Revise the definitions in this section as follows:

Provide a consistent and concise definition for "consultation."

In the preamble, the discussion of section 450.104 indicates that the definition of "consultation" remains largely unchanged. Later in the preamble, the discussion of section 450.214 indicates that the use of the term in that section differs from the definition in the existing or proposed regulation. The NPRM itself does not underscore this nuance. Clarification is needed in section 450.214. This section potentially involves "consultation" with environmental resource/regulatory agencies, many of whom use the term "consultation" in a very precise and different sense pursuant to other federal statutes. The use of this term in the proposed regulation may lead to some confusion on the part of such agencies. Further clarification in the NPRM itself would be beneficial in this regard.

Revise the definition of "environmental mitigation activities" to simplify and remove substantive regulatory requirements. The definition should retain only the first sentence and should read:

"Environmental mitigation activities means strategies, policies, programs, actions, and activities that, over time, will serve to avoid, minimize, rectify, reduce, or compensate for (by replacing or providing substitute resources) the impacts to or disruption of elements of the human and natural environment associated with the implementation of a

long-range statewide transportation plan or metropolitan transportation plan."

Delete the second sentence because it includes a laundry list of resources that are part of the human and natural environment. This list could easily be interpreted as a mandate to develop mitigation measures for each and every one of the listed topics. Such an interpretation would create undue burdens and excessive documentation. The first sentence adequately defines the basic concept of the definition.

Delete the third sentence because there is no statutory basis for requiring a "regional approach." States and MPOs should have the option of simply identifying the types of project-specific mitigation activities that will be considered for individual projects.

Delete the last sentence because it repeats substantive requirements that are contained elsewhere in the regulations regarding the need for consultation in developing the discussion of potential mitigation activities. The definition should not include substantive requirements; it should simply define the concept, while substantive requirements are defined elsewhere in the regulations.

Revise the definition of "obligated projects" to delete the phrase "in the preceding program year" so that the definition would read:

"Obligated projects means strategies and projects funded under title 23, U.S.C., and title 459, U.S.C., Chapter 53 for which the supporting Federal funds were authorized and committed by the State or designated recipient."

The requirement for "in the preceding program year" has no basis in statute and is inconsistent with other sections of the NPRM, such as, 450.216(i)(3) and 450.324(e)(3).

Revise the definition of a "regionally significant project" to remove "capacity expanding projects" and insert "capital projects that add travel lanes of at least one mile."

The definition of a "regionally significant project" is important because in Section 450.104 of the proposed regulations an "amendment" is defined to include the addition or deletion of a regionally significant project from a plan, TIP, or STIP, and triggers the need to re-determine conformity and fiscal constraint. Given the importance of this term, WSDOT recommends adopting the language above in the definition of "regionally significant project." As currently proposed the definition is too broad since expanding capacity can be accomplished by simple corrections of roadway deficiencies, improving traffic operations, or making other minor changes that typically would not warrant an amendment to a plan, TIP or STIP.

Revise the definition of "Regional Transit Security Strategy" to delete the term "overarching."

The proposed rule defines Regional Transit Security Strategy as "an *overarching* strategy for the region." The term "overarching" is ambiguous and more likely to create confusion than to clarify the intended meaning.

In place of Sections 450.206(b) and 450.306(b) retain the current regulation as written in 450.208(b). The existing regulation [450.208(b)] reads:

> *"The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation problems, land use, employment, economic development, environmental and housing and community development objectives, the extent of overlap between factors and other circumstances statewide or in subareas within the State."*

There is no basis in statute requiring the consideration of the planning factors in "all aspects" of the planning process. The existing language provides some assurance that flexibility will be provided in the enforcement of these requirements. There are many aspects of the planning process where individual planning factors may not be applicable.

Revise Section 450.208(a)(2), (3), and (6) to replace "coordinate" with "consider" and conform to statute.

Section 450.208(a)(2) proposes to require States to "coordinate" with planning carried out by statewide trade and economic development. This proposed regulation goes beyond the requirement of the statute. Comparisons of transportation and other non-transportation agency plans indeed may be beneficial to reveal information about demand for and need for the transportation system. However, expectations for non-transportation entities to prepare plans and programs may be unreasonable. Rather, States and MPOs should be encouraged to "consider" the concerns of statewide trade and economic development agencies. The provision should also clarify that these are governmental agencies.

Similarly, section 450.208(a)(3) would require States to "coordinate" statewide transportation planning with planning carried out by federal land management agencies. Such a requirement has no basis in the statute. Section 135(e)(2) of Title 23 simply requires a State to "consider … the concerns" of federal land management agencies. Consistency with the statute requires the paragraph to read, "consider the concerns of Federal land management agencies...."

Section 450.208(a)(6) would require States to "coordinate" statewide transportation planning with planning carried out in non-metropolitan areas of the State. This is not justified by the statute. Section 135(e)(3) of Title 23 only requires States to "consider the

concerns of local officials" in non-metropolitan areas. The proposed regulation should be revised to conform to the statute.

Revise Sections 450.208(f), (g), and (h) to clarify the relation to the statewide transportation planning process.

The statewide transportation plan, along with the process to develop it, is the "umbrella plan" that sets the policy direction for subsidiary plans and policies, including ITS systems, the coordinated public transit-human services transportation plans, and the Strategic Highway Safety Plan that all should help implement the statewide plan.

Further, in Section 450.208(f) replace "shall" with "should" to conform to statute. Paragraph (f) should be revised to read:

> *"The development of applicable regional intelligent transportation systems (ITS) architectures, as defined in 23 CFR 940, should be consistent with the statewide transportation planning process."*

The NPRM preamble (pg. 33516), if retained in the final rule, should be revised in a corresponding manner.

Remove Section 450.210(a)(2) and (b)(1) to conform to statute.

This provision for conducting a public involvement process on the procedures for other public involvement processes has no basis in the statute. WSDOT suggests that the regulation reflect more cognizance of the basic purpose for which States and MPOs plan, that is to provide a considered, rational basis for our elected decision makers to set needed policy direction for and make investments in the public's transportation system. Adding processes to processes to processes erodes the confidence the public and elected officials have in meaningful planning products and undermines the ability and efficiency of States and MPOs to achieve that purpose. These provisions add unnecessary steps in the planning process and require unmandated information about the transportation planning process and should be removed as barriers to effective transportation planning.

Revise Section 450.214(d) to conform to statute. The paragraph should read:

> *"(d) The long-range statewide transportation plan should address ways to increase safety. The long-range statewide transportation plan may incorporate, directly or by reference, or may summarize the details of methods to increase safety that are contained in the Strategic Highway Safety Plan required by 23 U.S.C.148.*

The proposed rule should be consistent with the statute which uses the language of "increase safety." The term "element" implies a specific, separate section (chapter) or identifiable portion of the long-range statewide transportation plan. These planning factors should be incorporated throughout the plan.

Revise Section 450.214(f) to conform to statute. The paragraph should read:

"(e) The long-range statewide transportation plan should address ways to increase security of the transportation system for motorized and non-motorized users."

The statute states: "increase the security of the transportation system for motorized and non-motorized users." There is no basis in statute for the security element to directly reference or summarize regional transit security strategies or the Department of Homeland Security. The Security element of the statewide long-range plans should address the security of the complete transportation system, not just transit.

In Sec. 450.214(j) delete reference to Appendix A.

WSDOT recommends deleting Appendix A as discussed above which would call for the removal of references to it.

In Sec. 450.314(a) delete "and the public transportation operator(s)."

This proposed rule adds public transportation operators to the requirement for cooperative agreements, thereby, increasing the administrative burden on all the parties without any supporting change in the underlying statute. We suggest the section be structured like the current section 450.310 allowing the MPO the flexibility to sign individual agreements with the State, transit agencies, and air quality agencies without the burden of coordinating one agreement between all the agencies and also to allow the procedures to be adjusted annually as agreed to in the unified planning work program.

In Sec. 450.314(a)(2) delete this section and replace with the following language.

"Where the parties involved agree, the requirement for agreements specified in paragraph (a) and (a) (1) of this section may be satisfied by including the responsibilities and procedures for carrying out a cooperative process in the unified planning work program."

The proposed Section 450.314 regulating Metropolitan Planning Agreements is more prescriptive and less flexible than the current section 450.310 that it is replacing. The section requires one written agreement among all organizations without allowing for the procedures to be specified in the unified planning work program as currently allowed in section 450.310(e). These changes increase the administrative burden on all the parties without any supporting change in the underlying statute. We suggest the section be structured like the current section 450.310 allowing the MPO the flexibility to sign individual agreements with the State, transit agencies, and air quality agencies without the burden of coordinating one agreement between all the agencies and also to allow the procedures to be adjusted annually as agreed to in the unified planning work program.